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Supreme Court, U.S.
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No. 98-1471

In The
SUPREME COURT OF THE UNITED STATES

ADVANTAGE WEST PALM BEACH, INC., BERT MOERINGS and MARSHA MOERINGS,

Petitioners,

v.

WEST PALM BEACH COMMUNITY REDEVELOPMENT AGENCY, INC.,

Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Fourth District

PETITIONERS' REPLY BRIEF

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14 pp

TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

ARGUMENT 1

1. Whether Petitioners' Development Rights Have Compensable Value Upon a Taking Thereof By Respondent Presents a Federal Constitutional Question. 1

   a. The CRA's position. 1

   b. Advantage's property rights. 3

   c. Intangible rights as "property" under the Takings Clause. 4

2. Florida's Approval of Uncompensated Takings of Development Rights Conflicts With This Court's Precedent. 9

TABLE OF CITATIONS

Cases	Page
Board of Regents v. Roth 408 U.S. 564 (1972)	5
City of Hollywood v. Hollywood, Inc. 432 So. 2d 1332 (Fla. Dist. Ct. App.), *review denied,* 441 So. 2d 632 (Fla. 1983)	6, 7
Eastern Enterprises v. Apfel 524 U.S. 498, 118 S. Ct. 2131 (1998)	6
Lynch v. United States 292 U.S. 571 (1934)	5
Nollan v. California Coastal Commission 483 U.S. 825 (1987)	9, 10
Palm Beach County v. Cove Club Investors Ltd. 1999 WL 189834 (Fla. Apr. 8, 1999)	6
Penn Central Transportation Company v. City of New York 438 U.S. 104 (1978)	6, 9
Pennsylvania Coal Co. v. Mahon 260 U.S. 393 (1922)	3, 4
Phillips v. Washington Legal Foundation 524 U.S. 156, 118 S. Ct. 1925 (1998)	2, 5, 8
Ruckelshaus v. Monsanto Company 467 U.S. 986 (1984)	5
Suitum v. Tahoe Regional Planning Agency 520 U.S. 725, 117 S. Ct. 569 (1997)	9, 10

Webb's Fabulous Pharmacies, Inc. v. Beckwith
449 U.S. 155 (1980) 5, 8

Wilkinson v. St. Jude Harbors, Inc.
570 So. 2d 1332 (Fla. Dist. Ct. App.), *review denied*, 576 So. 2d 295 (Fla. 1990) 6

Yee v. City of Escondido
503 U.S. 519 (1992) 3, 9

11

MICHAEL A. HELLER & JAMES KRIER, *Deterrence and Distribution in the Law of Takings*
112 HARV. L. REV. 997 (1999) 3

ARGUMENT

1. Whether Petitioners' Development Rights Have Compensable Value Upon a Taking Thereof By Respondent Presents a Federal Constitutional Question.

a. The CRA's position.

The CRA's eminent domain petition sought to take, by exercise of its condemnation powers, real property located within the DRI boundaries *and* "any and all *rights of development* appertaining to said property pursuant to City of West Palm Beach Ordinance No. 2268-89," the DRI ordinance. Appendix G at 36a (emphasis supplied). The state trial court's Agreed Order of Taking recites that the CRA will pay approximately $1.9 million to purchase "all ownership, right, title or interest of [Advantage] in real property or property of any nature, *including but not limited to development rights,*" located within the DRI "or otherwise related or pertaining to said development." Appendix E at 18a-19a. The order expressly provides that, upon payment of the $1.9 million, "full and complete title to all development, contract and other rights held, or allegedly held" by Advantage" pursuant to the various assignments of development rights. "shall vest in [the CRA] *Id.* at 17a-18a.[1]

On appeal, the Florida court held that the DRI ordinance had not created "transferable development rights," for the taking of which Advantage was "entitled to

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[1] Advantage and the CRA agreed, as reflected in the order, that Advantage had not waived "any right to full or just compensation for real property, development rights, contract rights or other rights subject to or impacted by this eminent domain proceeding," and that the CRA had not waived "any right to argue or contend that [Advantage] is not the lawful owner of said rights, that said rights were not validly assigned, that said rights have no value or any other defense that may be asserted by [the CRA]." *Id.* at 18a.

be compensated." Appendix A at 3a. The court based this holding "on the specific language" of the DRI ordinance. Appendix D at 14a.

These indisputable record facts are restated to place into context the CRA's extraordinary contention that the rulings by the Florida courts in this case should not be reviewed by this Court because the question whether Advantage's development rights even *existed* — much less had compensable value when taken by the government — is purely a question of *state law*. Response to Petition for Writ of Certiorari (hereinafter Response) at 12-13, 19-21. From this premise flows virtually all of the CRA's arguments in opposition to Advantage's petition, *e.g.*, that the Florida courts did not decide a federal constitutional issue (or if a federal issue was decided, there is an independent state law ground).[2] The principle that "a State by *ipse dixit*, may not transform private property into public property without compensation," *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 118 S. Ct. 1925, 1931 (1998) (citation omitted), disallows the CRA's attempt to justify its taking of Advantage's property without compensation on the ground that, as a purported matter of state law, the property never existed in the first place.

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[2] For reasons that are not entirely clear, the CRA purports to oppose the petition based on a purported omission of recitations concerning the manner in which the constitutional issues were raised in the state court proceedings. Response at 17-18. The CRA seems to believe that United States Supreme Court Rule 14(1)(g)(i) requires a *separate* statement concerning the manner in which the petitioner's federal constitutional issues were raised in the state court, while the text of the rule itself demonstrates that this recitation is to be *included* in the petitioner's factual statement. Advantage's factual statement amply complies with the rule's requirements. See Petition for Writ of Certiorari at 6-8.

b. Advantage's property rights.

The Development Order adopted by the City in the DRI ordinance is nothing more or less than a contract between the City and the original developer, the DUV, pursuant to which agreement the DUV was granted "development approval for approximately 78 acres of real property," subject to certain conditions, and further subject to the requirement that site plan approval be granted for "the development of individual parcels." Appendix F at 24a-30a. The Development Order, like any contractual agreement, is "binding upon ... the Developer and its assigns or successors in interest." *Id.* at 31a. Simply put, the Development Order entitles the developer to proceed with development within the DRI — development that is allowable *only* because of the rights to develop office space, retail stores, hotels and dwelling units that *did not otherwise appertain* to the property located within the DRI. Appendix F. It could hardly be said, and the CRA certainly makes no attempt to say, that the Development Order did not confer upon the developer a reasonable expectation that, upon compliance with the conditions set forth therein, the development rights conferred thereby could be exercised.

It is curious indeed that the CRA, having sought and obtained *actual title* to Advantage's development rights under the DRI ordinance and the Development Order, should now assert that the condemned property *never existed*. Perhaps the one constant in this Court's takings jurisprudence is the fundamental proposition that the Takings Clause requires payment of just compensation when the government "actually takes title" to private property. *Yee v. City of Escondido,* 503 U.S. 519, 522 (1992). Even before the advent of *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), this rudimentary precept was never in question. MICHAEL A. HELLER & JAMES KRIER, *Deterrence and Distribution in the Law of Takings,* 112 HARV. L. REV. 997, 1023 (1999) (hereinafter *Deterrents and Distribution*). No decision of this Court (or of any other court, for that matter) appears to have addressed the unusual proposition urged upon the Court by the CRA: that government may condemn property through

the use of the eminent domain power and then evade the just compensation requirement of the Fifth Amendment by asserting that the condemned property *never existed.*

In making this argument, the CRA goes even beyond the ruling of the state appellate court. The state court phrased the issue as being "whether appellants are entitled to compensation for certain 'development rights' as part of a taking in eminent domain." Appendix A at 2a. The court held that "[n]either the language of the DRI, nor the development process contemplated by the ordinance, support the conclusion that transferable development rights were created *for which appellants are entitled to be compensated.*" *Id.* at 3a (emphasis supplied). The court did not hold that the right to develop property is not in and of itself a property right — because such a holding would run counter to the very nature of "property" in American law. See Petition at 9-13. Rather, the court held that the development rights within the DRI did not "exist separate and apart from the underlying realty" and "were not severable from the realty," such that Advantage held "no separate, *compensable property interest* known as development rights." Appendix A at 2a (emphasis supplied). Thus is presented the federal constitutional issue posed by Advantage's petition, *i.e.*, whether a governmental taking of intangible development rights requires payment of just compensation.

c. Intangible rights as "property" under the Takings Clause.

The Court's takings jurisprudence has not often looked to the definition of private property. While "[t]he ... issue is obviously latent in every takings dispute, ... it is seldom aired in any because the 'propertyness' of the asset at stake in the litigation is usually uncontested." *Deterrence and Distribution, supra* at 1013. That intangible rights are "property" within the meaning of the Takings Clause, however, has never been seriously questioned. In *Mahon*, the Court struck down a statute that "destroy[ed] previously existing rights of property *and contract*." 260 U.S. at 413 (emphasis supplied). The oft-

cited decision in *Lynch v. United States*, 292 U.S. 571 (1934), expressly held that "[v]alid contracts *are property*, whether the obligor be a private individual, a municipality, a state, or the United States." *Id.* at 579 (emphasis supplied).

The CRA, however, urges that the issue is settled by state law, thereby taking the case out of the ambit of the Takings Clause and establishing an adequate state ground for the decision below. Response at 16-20. The CRA invokes the general proposition that property interests are created by state law, *id.* at 20-21, and insists that the state court's ruling should be allowed to stand because, as a matter of Florida law, "no 'development rights' were created by the Development Order," and Advantage thus "own[s] no property interest which has been taken by eminent domain." *Id.* at 16.

The underlying constitutional proposition upon which the CRA relies is correct: the formulation first adopted in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), to govern the application of procedural due process guarantees, has long been recognized as the standard for determining whether rights taken by a state are "property" under the Takings Clause. *E.g., Ruckelshaus v. Monsanto Company*, 467 U.S. 986, 1001 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). This Court reaffirmed that principle in *Phillips*, 118 S. Ct. at 1930 ("[b]ecause the constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law'") (quoting *Roth*).

In *Ruckelshaus*, the Court considered the question whether corporate trade secrets constituted "property" under the Fifth Amendment. 467 U.S. at 1001-02. The Court noted that it had found "other kinds of intangible interests to be property for purposes of the Fifth Amendments Taking Clause." *Id.* at 1003. As the Court recognized, "[t]hat intangible property rights protected by state law are deserving of the protection of the Taking

Clause has long been implicit in the thinking of this Court." *Id.* at 1003.[3]

The CRA's attempt to shield the Florida court's ruling in this case from review by invoking the rubric of state law founders on two unquestionable Florida law holdings. First, as the Florida Supreme Court very recently has reaffirmed, "all property within the state, both real and personal, tangible and intangible, is subject to the government's exercise of eminent domain," and "the class of compensable property interests has been enlarged to broadly encompass leaseholds, easements, and personal property, as well as incorporeal hereditaments such as franchises *and contract*." *Palm Beach County v. Cove Club Investors Ltd.*, 1999 WL 189834 (Fla. Apr. 8, 1999) (emphasis supplied). Second, as set forth in the Petition and essentially conceded by the CRA, Response at 16, Florida's long-standing approval of TDR programs constitutes a recognition that development rights can exist separate and apart from a parcel of real property. *E.g.*, *Wilkinson v. St. Jude Harbors, Inc.*, 570 So. 2d 1332, 1333 (Fla. Dist. Ct. App.) (TDRs "are not real property," but "are separated from their land source and re-established on a designated recipient site"), *review denied*, 576 So. 2d 295 (Fla. 1990); *City of Hollywood v. Hollywood, Inc.*, 432 So. 2d 1332, 1337-38 (Fla. Dist. Ct. App.) ("a TDR allows that development rights, attributable to one piece of land, be transferred to another"), *review denied*, 441 So. 2d 632 (Fla. 1983). Indeed, the decision in *City of Hollywood*, addressing the question that was left open by this Court in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 122 (1978), held that TDRs may be used to

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[3] The Court ultimately held that Monsanto had a property interest in its trade secrets, which interest was protected by the Fifth Amendment. *Id.* at 1003-04. This holding is consistent with this Court's recent decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998), and the other decisions on intangible rights and the Takings Clause cited in the Petition at 12 n.6.

"offer[] a developer 'fair compensation' in the form of increased development rights on other land in return for land use restrictions on the land sought to be preserved." *City of Hollywood,* 432 So. 2d at 1337.

The CRA accuses Advantage of having "confused the development order in this case with formal transfer of development rights (TDR) programs." Response at 16. What the CRA's argument ultimately reveals, however, is the utter lack of any such distinction. As the CRA argues, TDR programs "are authorized, established, and regulated by specific statutory provisions or a local ordinance." *Id.* The Development Order that created the DRI and the associated development rights *was established by local ordinance* and, like TDR programs, the development scheme for the DRI is closely regulated by the Development Order. Further, the Development Order expressly contemplates that the rights created thereby are transferable, because the ordinance provides that the Development Order "shall be binding upon and inure to the benefit of the Developer *and its assigns or successors in interest.*" Appendix F at 31a (emphasis supplied). There is absolutely no distinction, in law or in fact, between the "transferable" rights to develop within the DRI that were created by the Development Order pursuant to a municipal ordinance and what the CRA chooses to call "formal" TDR programs. Indeed, when Advantage sought rehearing before the state appellate court, asserting that the court appeared to have imposed, as a prerequisite to compensation for a taking of development rights, the existence of a "formal" TDR ordinance, the court took Advantage to task for having "misread the ... opinion." Appendix D at 14a. Thus, Florida law recognizes *both* that intangible rights constitute "property" and that development rights may be severed from real property.

The utter lack of any state law foundation upon which the CRA can rest its only argument in opposition to certiorari is patent. Moreover, even if the Florida court *had* ruled in the manner suggested by the CRA, *i.e.,* if the court had held that the development rights taken by the CRA did not exist under Florida law, this Court's decision

in *Webb's Fabulous Pharmacies* would pretermit the CRA's argument.

The issue in *Webb's Fabulous Pharmacies* arose from a county's retention of interest earned by monies deposited in an interpleader action, pursuant to a statute authorizing retention of the interest. 449 U.S. at 158-60. The state court held that the interest was not "private property." *Id.* at 163. This Court, while recognizing that "[p]roperty interests ... are not created by the Constitution," but rather by "existing rules or understandings that stem from an independent source such as state law," 449 U.S. at 161, declined to give controlling weight to the state court's holding:

> The county's appropriation of the beneficial use of the fund is analogous to the appropriation of the use of private property ....
>
> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county seeks simply by recharacterizing the principal as "public money" because it is held temporarily by the court. The earnings of a fund are incidents of ownership of the fund itself and are property just as the fund itself is property. The state statute has the practical effect of appropriating for the county the value of the use of the fund for the period in which it is held in the registry.
>
> To put it another way: a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power.

Id. at 163-64 (citations omitted). This Court reaffirmed the *Webb's Fabulous Pharmacies* holding in *Phillips*, emphasizing that, "at least as to confiscatory regulations ...

a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law." 118 S. Ct. at 1931 (citations omitted).

2. Florida's Approval of Uncompensated Takings of Development Rights Conflicts With This Court's Precedent.

The CRA's persistence in mischaracterizing Advantage's basis for invoking this Court's jurisdiction is also reflected in its attempt to argue that the decision below can be harmonized with this Court's decisions in *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), *Penn Central,* and *Suitum v. Tahoe Regional Planning Agency,* 520 U.S. 725, 117 S. Ct. 569 (1997). See Response at 12-15. The CRA cannot suggest that *Nollan* did not endorse the severability of independent property rights, so the CRA is left with the argument that *Nollan* "did not involve a taking under California's eminent domain proceedings." Response at 14. The CRA, however, is forced to acknowledge that this Court in *Nollan* "determined ... whether or not the infringement of these rights was compensable pursuant to the Takings Clause of the Fifth Amendment." *Id.* Surely the CRA is not suggesting that this Court would have decided *Nollan* differently had the easement in that case been taken in a condemnation proceeding under state eminent domain law.

The only meaningful distinction between an *inverse* condemnation claim, such as was made in *Nollan*, and a claim for compensation arising out of an eminent domain taking, such as in the present case, is that the party seeking recovery on an inverse condemnation theory must *first* establish that there has been a "taking," *Nollan* 483 U.S. at 831, whereas there *unquestionably* has been a taking when the government exercises its eminent domain power, *e.g., Yee,* 503 U.S. at 522. Thus, there is no principled way in which to say that a regulatory "taking" of severable property rights entitles the property owner to compensation, whereas *no* compensation is due to a property owner whose rights are taken by eminent domain. Indeed, merely to

state the proposition is to demonstrate its utter absurdity. This Court's decision in *Nollan* speaks directly to the point:

> Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather ... "a mere restriction on its use," is to use words in a manner that deprives them of all of their ordinary meaning. Indeed, one of the principal uses of the eminent domain power *is to assure that the government be able to require conveyance of just such interests, so long as it pays for them.* Perhaps because the point is so obvious, we have never been confronted with a controversy that required use to rule upon it ....

483 U.S. at 831 (citations omitted; emphasis supplied).

Addressing *Suitum,* the CRA accurately recites that the issue presented to the Court in that case was the ripeness of the inverse condemnation claim. Response at 14-15. What the CRA chooses to ignore, however, is the majority's holding in *Suitum* that the valuation of TDRs "is ... simply an issue of fact about possible market prices," 107 S. Ct. at 1668, *i.e.,* the Court's express acknowledgement that severable development rights *have value*. Indeed, as noted in the Petition, and unremarked upon by the CRA, the TDRs at issue in *Suitum* are utterly indistinguishable from the development rights conferred by the DRI ordinance in this case. See Petition at 20-22. The CRA cannot explain away the Florida court's declaration that severable development rights, as a matter of law, *have no value* when those rights are taken by government in an eminent domain proceeding.

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